

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

3
4 HIGHSTEPPIN' PRODUCTIONS, LLC,)
Plaintiff,)
5)
6 vs.) CA No. 09-12208-NMG
7)
8 GEORGE PORTER, JR., et al,)
Defendants.)

9
10 BEFORE: THE HONORABLE NATHANIEL M. GORTON

11
12 HEARING ON MOTIONS

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14
15 John Joseph Moakley United States Courthouse
Courtroom No. 4
16 One Courthouse Way
Boston, MA 02210
17 Tuesday, April 20, 2010
11:17 a.m.

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20 Cheryl Dahlstrom, RMR, CRR
21 Official Court Reporter
22 John Joseph Moakley United States Courthouse
One Courthouse Way, Room 3209
23 Boston, MA 02210
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25

1 APPEARANCES:

2 BAKER & ASSOCIATES

By: Jeffrey S. Baker, Esq.

3 Two West Hill Place

Boston, Massachusetts 02114

4 - and -

LAW OFFICE OF DAVID A. HERLIHY

5 By: David A. Herlihy, Esq.

14 Staniford Street

6 Newton, Massachusetts 02466

On behalf of the Plaintiff.

7 JOHN PIEKSEN & ASSOCIATES, LLC

8 By: John O. Pieksen, Jr., Esq.

829 Baronne Street

9 New Orleans, Louisiana 70113

On behalf of the Defendant George Porter, Jr.

10 THE PENTON LAW FIRM

11 By: Ronnie Glynn Penton, Esq.

209 Hoppen Place

12 Bogalusa, Louisiana 70427

On behalf of the Defendant Porter Batiste Stoltz, LLC.

13 GREENBERG TRAURIG LLP

14 By: Eric M. Gold, Esq.

One International Place

15 Boston, Massachusetts 02110

On behalf of the Defendant Live Nation, Inc.

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1 P R O C E E D I N G S

2 THE CLERK: This is Civil Action 09-12208,
3 Highsteppin' Productions vs. Porter, et al. Will counsel
4 please identify themselves.

5 MR. PENTON: Ronnie Penton on behalf of the PBS
6 defendants. My daughter, the young lawyer in the room, Mary
7 Ellen Penton, assisting me, Judge.

8 THE COURT: Mr. Penton, Miss Penton.

9 MR. PIEKSEN: Good morning, Judge Gorton. John
11:17 10 Pieksen on behalf of George Porter, Jr.

11 THE COURT: Mr. Penton, you don't represent Mr.
12 Porter?

13 MR. PENTON: I represent Mr. Batiste, Mr. Stoltz and
14 PBS, Judge.

15 THE COURT: But not Mr. Porter?

16 MR. PENTON: That's correct.

17 MR. BAKER: Judge, good morning. My name is Jeffrey
18 Baker. I'm here on behalf of the plaintiff, Highsteppin'
19 Productions. To my immediate right is Attorney David Herlihy.

11:18 20 THE COURT: Mr. Herlihy, you represent the plaintiffs
21 as well?

22 MR. HERLIHY: I'm in-house counsel.

23 THE COURT: Do you have an appearance in on this case?

24 MR. HERLIHY: No, I do not.

25 THE COURT: I would like you to put an appearance in

1 before you leave today, Mr. Herlihy. Thank you. You may be
2 seated, counsel.

3 MR. GOLD: Your Honor, Eric Gold, from Greenberg
4 Traurig, on behalf of the reach-and-apply defendant, Live
5 Nation.

6 THE COURT: Mr. Gold.

7 MR. GOLD: Your Honor, if I can skip ahead a little
8 bit, we had filed a motion to dismiss, and plaintiff's counsel
9 let us know today that they will be assenting to that motion.
10 So that I think that my appearance is no longer required.

11 THE COURT: All right. Is that true, Mr. Baker? You
12 assent to the dismissal of Live Nation as a reach-and-apply
13 defendant?

14 MR. BAKER: That is correct, your Honor.

15 THE COURT: All right. Then you can be excused, Mr.
16 Gold. I will allow that motion, it being assented to.

17 MR. GOLD: Thank you very much, your Honor.

18 THE COURT: All right. Counsel, we have multiple
19 motions at issue here. And what I'm going to do is to announce
20 to you my strong inclinations, having considered the rather
21 lengthy -- in fact, over-lengthy briefs in the case of the
22 motions to dismiss for lack of jurisdiction and/or for transfer
23 of venue and with respect to -- one of the issues now, of
24 course, has just gone away, and that is, to dismiss the
25 reach-and-apply defendant, Live Nation. But there is also a

1 motion for contempt for failure to comply with the preliminary
2 injunction that was entered last January.

3 First, let me say that my initial reading of the
4 motion with respect to the defendants dismissing for lack of
5 jurisdiction is going to be denied. I believe there is
6 sufficient evidence to indicate that the individual defendants
7 have appeared in Massachusetts sufficient to convey
8 jurisdiction on this district. Obviously, when we get to the
9 motion to transfer venue, it is a discretionary decision.

11:20 10 There is going to be inconvenience with respect to somebody,
11 either the plaintiff appearing in Louisiana or the defendants
12 appearing here in Massachusetts.

13 It seems to me that the plaintiffs have made a strong
14 argument that their choice of forum should be respected. There
15 is no reason that jumps out to this Court as to why I should
16 transfer this case to Louisiana or that I don't have
17 jurisdiction. So I am going to allow, in a moment, the
18 defendants to have a few minutes to try to dissuade me from
19 that ruling, that is, my strong inclination at this stage.

11:21 20 With respect to the contempt, it does seem to me that
21 the defendants acted contemptuously to my injunction, at least
22 until the responses that have come in after the filing of the
23 motion, which tell me that for the last two-and-a-half months
24 the defendants have been faithfully trying to get together the
25 information that is necessary to comply with that injunction

1 and have, in fact, put aside at least 20 percent of the
2 receipts.

3 I don't recall any time saying in my injunction that
4 the defendants were required only to put aside 20 percent of
5 their receipts. But, nevertheless, that's what apparently they
6 have done on the assumption, I suppose, that that's what you
7 were required to do under the agreement with the plaintiff, the
8 principal of which is this Mr. Stepanian, an artist management
9 company.

11:22 10 But the entry of the preliminary injunction was not
11 simply to get us back onto the track of what was required under
12 that agreement. It was to have something available in case the
13 plaintiff wins on the merits their claim that they're owed
14 somewhere up around a half a million dollars. So I'm not sure
15 on what grounds the defendants believe they are not in contempt
16 of this court by simply putting 20 percent of the proceeds that
17 they've received since January 1st in an account to be held by
18 the defendants' lawyers in Louisiana, which was authorized. So
19 I am waiting for an explanation as to why I should not hold the
11:22 20 defendants in contempt in that regard.

21 The only other remaining outstanding motion that I'm
22 aware of is the plaintiff's motion to impound or to seal, which
23 is entirely without detail, and I have no idea what it is that
24 the defendant -- rather, that the plaintiff wants me to
25 impound. So I'm not inclined to allow that motion unless and

1 until I am convinced that there is something that needs to be
2 impounded or sealed. So I am inclined to deny that motion of
3 the plaintiff's.

4 As I've said before, the fourth motion is now moot
5 because Live Nation has been dismissed from this case.

6 I received just this morning apparently another motion
7 for entry of a default against the Defendant Funky Meters,
8 Inc., which I am not prepared to rule on. It obviously hasn't
9 even been responded to by the defendants, and I am not --
11:24 10 apparently am not conversant with the relationship between the
11 individual defendants and the corporate reach-and-apply
12 defendant, Funky Meters, Inc. I surmise that there is some
13 relationship because it sounds as though Mr. Porter has an
14 ownership interest in that Funky Meters, Inc., but I don't know
15 what the corporate relationship is and, therefore, am not
16 prepared to go forward with resolving that issue.

17 But I'm going to hear briefly from either Mr. Pieksen
18 or Mr. Penton now with respect to the defendants' motion to
19 dismiss this cause of action for lack of jurisdiction and/or
11:24 20 transfer of venue. Who's going to be speaking for the
21 defendant? Mr. Pieksen?

22 MR. PIEKSEN: I will, sir, yes, Pieksen.

23 THE COURT: Okay.

24 MR. PIEKSEN: Judge, for efficiency sake, I'm assuming
25 you want to hear strictly about transfer. Or should I try and

1 dissuade you on personal jurisdiction?

2 THE COURT: I told you where I stand, and I'm not
3 going to give you a whole lot of time. I'm going to give you
4 ten minutes right now to --

5 MR. PIEKSEN: Okay. Let me hit the transfer first,
6 then. Obviously, the standard is about three prongs. It's the
7 convenience of the witness, trial efficiency, financial
8 positions of the parties. The first thing that we would
9 indicate is that -- and this may play into a number of aspects
10 of our motion. But it is very clear that the defendants
11 specifically rejected a forum selection clause.

12 We're aware that the opposition semantically
13 re-categorizes that, but it was an arbitration clause in
14 Boston. And that was negated and taken out of the contract. I
15 think that goes a long way towards establishing the intent of
16 the defendants, the foreseeability, whether they expected to
17 be, you know, hauled or hailed into court in Massachusetts.

18 THE COURT: That has to do with jurisdiction rather
19 than venue, doesn't it, Mr. Pieksen?

11:26 20 MR. PIEKSEN: I think it goes towards both,
21 predominately jurisdiction, but I think there is some overlap
22 to venue as well. It certainly indicates that this issue came
23 up and was addressed in contract formation, which would tie
24 into convenience of witnesses and perhaps some of the other
25 issues on the transfer of the 1404, which is why I bring it up.

1 Moving on to the witnesses --

2 THE COURT: But the agreement between the parties does
3 talk about Massachusetts law applying, does it not?

4 MR. PIEKSEN: Yes, it does, sir. No question that
5 Massachusetts law applies, but I think it's a long way from
6 Massachusetts law applies to Massachusetts law will be applied
7 in Massachusetts, especially under federal diversity.

8 As far as the element of the convenience of the
9 witnesses, I mean, we briefed it, you know. There's not a
10 whole lot more to add to that except to amplify that while both
11 sides have submitted documentation to your Honor of voluminous
12 witnesses who may be called in this case, what's really
13 relevant is the witnesses who can talk about contract
14 formation, contract performance, and contract breach.

15 I believe from the plaintiffs you'll see an affidavit
16 stating that there are about 80 witnesses, 20 of whom are
17 identified in the pleadings, and all of whom appear to be
18 vendors or other sort of ancillary players, shall we say, in
19 this arrangement. They will not be able to testify as to
20 contract formation. They will not be able to testify as to the
21 defendants' activities, especially the defendants' activities
22 in Massachusetts if -- you know, if that issue is still open in
23 your mind.

24 So, you know, the witnesses who will be involved on a
25 level would be all three individual defendants, their wives or

1 partners who were available and present during some of the
2 meetings in Louisiana. And just to give you, again, the real
3 quick background, these defendants did not seek out
4 Highsteppin'. Highsteppin' came to them. January 18, 2005,
5 email from Highsteppin's principal to Mr. Porter soliciting --
6 essentially asking for a meeting to discuss merchandising.

7 And if you notice, when -- if you hadn't had a chance
8 to look at that email in depth, it talks about an
9 artist-controlled environment. That's key because while that
10 was discussed, that's not what transpired here. What basically
11 transpired -- it got flipped on its head.

12 The reason I bring that up is you see an email talking
13 about artist-controlled environment setting up a situation for
14 the arrangement that was not carried out. That
15 artist-controlled environment was key to the defendants. And
16 so, you know, those witnesses who can talk about all of that,
17 they're all in Louisiana. You have the three individual
18 defendants. You have their wives. You have perhaps one or two
19 other individuals who were active with Mr. Eveline, who was the
20 attorney down in Louisiana, who were actively involved at that
21 stage.

22 Countered against that, you have the plaintiff with
23 one principal and the plaintiff's in-house counsel. The rest
24 of the witnesses on both sides, quite frankly, are minor. And
25 I will say in this analysis, they really don't factor in. So

1 the convenience of the witnesses, I would argue --

2 THE COURT: Let me change the subject just a minute.
3 Apparently, there's a fact contest as to where the contract was
4 actually executed. You say it was executed in Louisiana. The
5 plaintiffs say it was executed in Massachusetts. What evidence
6 do you have in support of your claim?

7 MR. PIEKSEN: Sure. If I could, your Honor, I think,
8 more specifically, the contract states that it was entered into
9 in Massachusetts. I'm not sure whether the plaintiffs have
11:30 10 actually factually averred that it was signed anywhere other
11 than New Orleans.

12 THE COURT: That's a start. Why did your client sign
13 if they didn't believe that it was actually entered into in
14 Massachusetts when it says in black and white that it was?

15 MR. PIEKSEN: It's a good question. I'll tell you my
16 clients are much better musicians than they are lawyers.

17 THE COURT: They didn't have legal counsel when they
18 were executing this agreement?

19 MR. PIEKSEN: They had counsel, your Honor. They had
11:30 20 counsel.

21 THE COURT: So I can't blame them for their lack of
22 knowledge of the law.

23 MR. PIEKSEN: I wouldn't ask you to do that. I would
24 ask you to take it into consideration, the relative
25 sophistication legally of the parties.

1 What I would indicate to you is that even if
2 Massachusetts law applies that still doesn't necessarily
3 mandate venue and jurisdiction in Massachusetts.

4 THE COURT: I understand that. But the phrase that
5 we're dealing with now is -- in the contract it says the
6 contract was "executed" in Massachusetts.

7 MR. PIEKSEN: I think -- with all due respect, I think
8 it says "entered into."

9 THE COURT: All right, "entered into." Fair enough.

11:31 10 MR. PIEKSEN: That's in the contract. The language is
11 there. The language is factually inaccurate, albeit in the
12 contract. Mr. Stepanian, I guess, had first met Mr. Porter
13 and, I believe, Mr. Stoltz in Florida. Then he came to New
14 Orleans. They met at Mr. Porter's house. There was some
15 discussion. And the contract, the agreement, was actually
16 signed in New Orleans during Jazz Fest in 2006, so almost four
17 years ago. I think that goes a long way towards showing
18 Louisiana.

19 Getting back to, you know, performance in and breach,
11:32 20 we have allegations of a breach of contract but no specific
21 facts that I can discern on what exactly the breach was. All
22 the gigs, all the engagements, were played. Proper notice,
23 timely notice, was given of nonrenewal of the agreement. It
24 was a two-year agreement with, you know, subsequent periods
25 that could be agreed to.

1 And it appears that really this lawsuit in large part
2 is a genesis from the defendants' decision not to continue with
3 the contract, which they had a legal right to do. So where is
4 the breach? They played everything. They did what they were
5 supposed to do. I'm sure --

6 THE COURT: Did they pay the commissions and return
7 the advances that allegedly were made by the plaintiffs?

8 MR. PIEKSEN: That's an interesting question. If you
9 notice, in the pleadings the plaintiff alleges that all the
11:32 10 money went through their bank accounts. Defendants didn't get
11 the money. They got some salary for a while and then that's
12 it. They don't even have control over their own money.

13 You'll notice that there was an allegation that the
14 defendants netted \$650,000. Well, what's the gross? We're
15 waiting on an accounting. That's one of the things -- once we
16 get past the preliminary venue and jurisdiction issues, we're
17 eager to get to the merits. We're eager to see the accounting.
18 We're eager to see what these expenses are. What money was
19 spent? Where? When?

11:33 20 The contract calls for written approval of all
21 expenses over \$2,000 a month. There is no such written
22 approval, and yet there's an allegation that
23 half-a-million-dollars-plus was spent over three-and-a-half
24 years on a band that was making roughly \$100,000 a year. It
25 doesn't add up. To answer you on the accounting, we're

1 waiting. We'd like to see it.

2 To get back into the other aspects of the alleged
3 breaches, there's no breach that the guys didn't do what they
4 were supposed to do, didn't play the music they were supposed
5 to play.

6 And then the performance of the contract, again,
7 95-plus percent of the defendants' obligations under this
8 contract occurred outside Massachusetts. We sent you a list
9 attached as an exhibit to our reply that had, as best as we can
11:34 10 create, all the engagements, all the performances entered into
11 by the defendants. And of those 200-some-odd performances,
12 somewhere between four and eight were in Massachusetts. The
13 rest were elsewhere.

14 THE COURT: The last I heard, though, when one
15 establishes whether or not there's jurisdiction, I don't have
16 to look at percentages of the time spent outside of the
17 district and in the district. It's whether or not there were
18 sufficient contacts. Nobody has told me that that's more or
19 less than 5 percent of the activity of the corporation. So I
11:35 20 don't -- that doesn't, you know, weigh on whether or not I have
21 jurisdiction over your clients.

22 MR. PIEKSEN: Well, I would submit to you that it
23 factors in when you look at the substantial nature of the
24 contract -- of the contacts in the forum state, the
25 foreseeability of coming into the forum state. It was not

1 foreseen -- if this had been a contract to come up and play a
2 gig -- is it Great Woods, Little Woods? Some venue. If it was
3 a contract to come up and play House Of Blues, something like
4 that, I wouldn't be making this argument to you because it's
5 clear that the performance of that type of contract would be in
6 Massachusetts.

7 But this contract was not contemplated as a
8 Commonwealth-based contract. Plaintiff's own pleadings, you
9 know, state that the defendants were virtually in a different
11:36 10 city every day. They're working, traveling musicians. They
11 play coast to coast. They don't play Europe and Japan. They
12 never have as this group. We'll table that for now. But
13 they've -- the point being is that it's minimal the actual
14 in-Massachusetts efforts, you know, by the defendants. And I
15 think that ties back into standing.

16 THE COURT: I need you to wrap up, Mr. Pieksen.

17 MR. PIEKSEN: Sure, sure. Let me go pretty quickly.
18 Trial efficiency, again, I mean, we understand that it's
19 somewhat of a close call, but we would submit to the Court that
11:36 20 the issuance of subpoenas for getting witnesses to trial,
21 important witnesses, would militate towards Louisiana.

22 Certainly, the cost. You know, the defendants, like I
23 say, are working musicians. You can tell from the escrow
24 submissions that Mr. Batiste and Mr. Stoltz do not make much
25 money whatsoever. Mr. Porter was making a living. He's having

1 a bit of a struggle now with some of the restrictions on his
2 income that are currently in place. But, you know, I think
3 when you balance the financial positions, that definitely
4 weighs in favor of the defendants.

5 If I need to wrap up, that's basically it, Judge,
6 unless you have any other questions.

7 THE COURT: Thank you. I'll hear from Mr. Baker in
8 that regard.

9 MR. BAKER: Thank you, Judge. Unless the Court
11:37 10 advises me otherwise, I'll just respond to his points. Your
11 Honor, as far as contract formation goes, Attorney David
12 Herlihy to my right is in-house counsel. He spent months
13 negotiating the agreement. He had numerous telephone
14 conversations and conferences and the exchange of emails with
15 Attorney Eveline. A number of different generations of
16 contract went back and forth.

17 Mr. Porter and his wife were in the Commonwealth of
18 Massachusetts in September, at the expense of my client, for
19 approximately five days. They had daily meetings concerning
11:38 20 negotiations with respect to the formation of the contract.
21 During that same period, your Honor, Mr. Stepanian provided
22 airfare and lodging for Brian Stoltz, one of the other
23 defendants who also participated in the formation of the
24 contract by way of negotiations.

25 In November of 2005, Mr. Porter was artist in

1 residency for a week at Berklee School of Music. During that
2 entire period of time, Mr. Stepanian had daily meetings with
3 Mr. Porter here in the Commonwealth of Massachusetts about the
4 formation of a management agreement. All of these terms
5 ultimately formed the basis for an agreement.

6 The mention by my brother from New Orleans with
7 respect to the arbitration clause, it was an arbitration
8 clause. It wasn't agreed upon. It was taken out. Paragraph
9 21 of the agreement, your Honor, makes clear choice of law was
11:39 10 Massachusetts. And because of the nature of where the
11 defendants were going to be traveling and where the defendants
12 were at the time that all of these discussions occurred, the
13 parties agreed the formation of the agreement would be in
14 Massachusetts. It's in Paragraph 21.

15 In addition to that, your Honor, the contract was to
16 be deemed performed in Massachusetts for the same reason. I've
17 submitted to your Honor an affidavit signed by my brother, Mr.
18 Herlihy, which makes clear these terms were contemplated by the
19 defendants. They didn't rebut them. They didn't dispute them.
11:39 20 That was the basis for Paragraph 21.

21 I wish to draw the Court's attention to Paragraphs 2
22 and 3 of the agreement. Paragraph 2, your Honor, makes clear
23 of the precise services that Highsteppin', as the management
24 company, would provide. It goes through an extremely expansive
25 litany of services that Highsteppin' was going to provide to

1 the defendants. If you read Paragraph 2 in conjunction, your
2 Honor, with Paragraph 3, which is styled, "Authority of
3 Highsteppin'," I just wish to read to the Court the very first
4 sentence. "Highsteppin' is hereby irrevocably appointed
5 Artist's exclusive, true and lawful attorney-in-fact, for the
6 full Term, which appointment is hereby deemed a right coupled
7 with an enforceable interest therein, for Artist and in
8 Artist's behalf, to do any of the following." It gives
9 Paragraph 3 a Roman Numeral 10 explanation of all of the
11:40 10 services that Highsteppin' was going to perform here in the
11 Commonwealth for the benefit and with the express agency
12 approval by the defendants.

13 I wish to draw the Court's attention to a case which
14 the defendants cited called Daynard. It's a First Circuit
15 Court of Appeals case, your Honor, which says, where an agent
16 is part of the basis for jurisdiction, that can meet the
17 requirements of due process. Interestingly enough, the
18 defendants never disputed the Long-Arm Statute and whether the
19 plaintiff's arguments comply. We certainly briefed it to your
11:41 20 Honor.

21 The basis for our jurisdiction is simply not formation
22 of the agreement, but it certainly includes that. It's the
23 entire three-and-a-half-year performance by Highsteppin' with
24 the express authorization and at the direction of the
25 defendants. I'm not going to burden the Court with the myriad

1 things they did, but on a daily basis -- and it's in the
2 papers. It's in Mr. Stepanian's affidavit, Mr. Herlihy's
3 affidavit and three other affidavits from independent
4 contractors and employees. On a daily basis they checked with
5 the venues. They received payments here in the Commonwealth of
6 Massachusetts. They paid for the hotel. They paid for the
7 bus. They paid for the car. They paid for the flight. They
8 had scores of emails back and forth every day from Mr. Batiste,
9 Mr. Stoltz and Mr. Porter as to any logistical need whatsoever
11:42 10 they had.

11 In addition, here in the Commonwealth, we were in
12 charge of and we complied with replication of CDs. We'd take a
13 master. We would multiproduce it and distribute it. We were
14 in charge of their e-commerce. We developed web pages here in
15 the Commonwealth, and we maintained them for each of the
16 defendants. We increased their email lists from 300 to 10,000.
17 If Mr. Porter's fan asked Mr. Porter for a signed photograph of
18 Mr. Porter, he would instruct somebody from Highsteppin' --
19 they would put the stamp on the envelope and put the picture in
11:42 20 the mail. The level of participation on behalf of
21 Highsteppin', I submit to your Honor, with respect to the work
22 that we did for the defendants, with their knowledge, with
23 their express assent, consent, and for their benefit, is
24 expansive.

25 Mr. Pieksen says I don't really understand what this

1 dispute is about. Attached to our amended complaint and to our
2 original complaint, your Honor, is our accounting which
3 identifies \$527,000 person by person of the three putative
4 defendants and how much each of them owes and for what purpose.

5 In addition to that, when I submitted to your Honor --
6 or to this court, I should say, excuse me -- our motion for a
7 preliminary injunction, Mr. Stepanian signed an affidavit.
8 Again, there was that same accounting person by person, amount
9 and breakdown of the monies that were owed.

11:43 10 Mr. Pieksen raises an interesting point which I just
11 wish to address to the Court because I don't think it's really
12 part of today's hearing. But that is, where did the money go?
13 The defendants constantly asked us and we provided to them,
14 because we had an interest in a larger picture, a bigger
15 business enterprise, loan advances and monies so that they
16 could fund their lifestyles in whatever manner that they
17 wanted, and seldom did Mr. Stepanian ever turn them down.

18 The monies that we were entitled to, they wanted to
19 reinvest in the business and we agreed at the time. And that's
11:44 20 why there is this substantial amount of money, which could very
21 well have not been a bigger issue if the defendants had not
22 chosen to pull out of this agreement. So that is, your Honor,
23 why I suggest that --

24 THE COURT: You've talked about jurisdiction. Talk a
25 couple of minutes about venue.

1 MR. BAKER: Your Honor, with respect to the witnesses
2 we have identified, these are -- the case law says it's not
3 simply the number. It's the quality of witnesses. These are
4 people -- if you look at Mr. Stepanian's affidavit, Mr.
5 Herlihy, Miss Dyer and the other two persons, these witnesses
6 all go to the very heart of contract performance, what we did
7 here in the Commonwealth of Massachusetts with respect to
8 managing their business, paying their bills, answering their
9 daily calls and everything.

11:44 10 I've only put in Mr. Stepanian's affidavit 32
11 identified witnesses because I didn't want to overwhelm the
12 Court. I have a list of the other 50-some-odd witnesses. I
13 think those 32 witnesses, who are all local, who are all
14 capable of testifying about the core issue, which is, how is
15 Mr. Stepanian's business -- how did it perform with respect to
16 the contract that it entered into with the defendants? The
17 defendants cited that it's easy. Did they pay? No, they
18 didn't. That is our allegation. Did we perform? We did all
19 of these services. We provided ongoing business foundation for
11:45 20 their needs while they were traveling around the world. Thank
21 you, your Honor.

22 THE COURT: All right. Mr. Pieksen, do you want one
23 minute of rebuttal?

24 MR. PIEKSEN: I'll take it, sir.

25 THE COURT: Okay. You can stay there if you'd like.

1 MR. PIEKSEN: Thank you. Real briefly, first of all,
2 it's not the plaintiff's activities in the forum state that
3 matter. It's the defendant's. I mean, the case law is clear.
4 So I'd like to make that. Nobody disputes that the plaintiff
5 is based here and the plaintiff did what the plaintiff did in
6 Massachusetts. It's what the defendants did or did not do in
7 Massachusetts. So I'd like to make that point.

8 The accounting, we saw. It's really a nonissue for
9 today, although we would indicate it's woefully inadequate. It
10 doesn't really answer the questions.

11 As far as reinvesting in the business, whose business?
12 The money wasn't reinvested in PBS or the three individual
13 defendants. I'd like to point that out.

14 As far as Mr. Porter and Mr. Stoltz being in Boston,
15 the question really is, you know -- Number 1, that was before
16 the contract, almost a year before the contract. Number 2, it
17 was never presented that way. What was presented was Katrina
18 hit. Everybody got wiped out. And, you know, quite frankly,
19 Mr. Porter and his wife thought that they -- it was a friend
20 who was helping them out in a time of need, not somebody who
21 would come back as a wolf in sheep's clothing and say, I helped
22 you out when you were down and now we have jurisdiction over
23 you. It's irrelevant, quite frankly. It was before the
24 contract. There were no week-long meetings for contract
25 formation.

1 Quite frankly, I would suggest if the Court needs to
2 hear more on this, perhaps we could do a videoconference with
3 some witnesses if the Court has further questions in the future
4 to facilitate, or we'll come back up here if we need to. But I
5 would just like to point that out, that any largesse that was
6 given to Mr. Porter or Mr. Stoltz was not given under the guise
7 of, hey, this is part of a contract and a business arrangement.
8 It's more like, jeez, you guys had a real bad turn of events
9 down there. We'll try and help you out. Any questions, your
11:47 10 Honor?

11 THE COURT: No. Thank you. Thank you, Mr. Pieksen.
12 These arguments are, as usual, never all one side and not on
13 the other. But I have sufficient evidence to decide this
14 motion, and I am going to deny the motion to dismiss for lack
15 of personal jurisdiction, and I am going to deny the motion to
16 transfer venue. So the case is going to stay in this session.

17 And I now have before me a motion for contempt, but I
18 would ask you, Mr. Baker, to address that motion in light of
19 the filings that have been made by the defendants since the
11:48 20 filing of that motion. It does seem to me that a good-faith
21 effort has been made on behalf of the defendants to explain to
22 me the lack of immediate response; that is, it took apparently
23 two-and-a-half months after my entry of the preliminary
24 injunction, but, in fact, there has been a submission that
25 tries to explain to me what money was received by the

1 defendants and where it is and what amount has been put aside.

2 How does that change your motion to me to hold the
3 defendants in contempt?

4 MR. BAKER: Your Honor, I just received this morning,
5 just to be clear, a supplement by Mr. Penton, so I don't really
6 know exactly what they've said. But I do have the benefit of a
7 submission which Mr. Penton made approximately a week ago, so
8 I'm working off of that one. I just want to be clear with the
9 Court.

11:49 10 Your Honor's order said performance fees shall be paid
11 into escrow. And perhaps your Honor may recall, but if not,
12 let me refresh the Court's memory, please. Mr. Penton and I
13 had a number of discussions in January about restraining monies
14 at least until he could, to use his repeated statements, get
15 his hooks in, which I construed to mean to file his appearances
16 and get approved and all of that. Fine. He sent me a letter,
17 and I presented it to the Court and the Court said fine. Let's
18 file this.

19 The order that you entered states that the performance
11:49 20 fees shall be escrowed. They shall be identified to me within
21 ten days of the defendants knowing about them. For instance,
22 the defendants are alerted that they're going to have a gig.
23 It's going to be a \$5,000 fee. Ten days later Mr. Penton says,
24 Mr. Baker, your \$5,000 is coming in, of which Mr. Porter gets
25 \$3,000. What I'm having a problem with, your Honor, is the

1 amount that we're owed is approximately \$550,000.

2 The defendants have created their own accounting
3 system. Your order says place the fees in escrow. We chose
4 Mr. Penton because that's what he wanted. I presented the
5 letter to your Honor and your Honor accepted. It doesn't say
6 deduct what you consider to be reasonable expenses or necessary
7 expenses or direct expenses and then, after that, take what's
8 left and calculate 20 percent and put that in escrow or exempt
9 in its entirety some of those fees, which is what they've done.

11:50 10 We have an idea of how much money is going to be paid
11 through May 31st. I cite May 31st as a date, your Honor,
12 because the New Orleans Jazz Fest is happening in about two
13 weeks, I believe.

14 MR. PIEKSEN: Two days.

15 MR. BAKER: Two days, as my brother advises. And
16 substantial revenues are going to be generated by the
17 defendants. Your order is clear. The fees will be paid into
18 escrow within ten days of identification. I don't really care
19 that they were late. I spoke to Mr. Penton in February. He
11:51 20 said I was going to have it in two days. I waited another
21 month and a half and filed my motion.

22 What I care about, Judge, is that Mr. Stepanian's
23 affidavit shows he believes it's somewhere in the neighborhood
24 of \$200,000 will be grossed by these defendants through May
25 31st. They have filed an accounting with the Court that shows

1 \$4,000 or \$5,000 paid, and we believe at least half of that
2 money has been generated through to today. What I find myself
3 subjected --

4 THE COURT: I'm sorry. They say how much is going to
5 -- 400,000, did you say?

6 MR. BAKER: No, sir. What I said was, we believe
7 through the filing of the complaint for contempt, which is, I
8 think, April 12th, with the Court, Mr. Stepanian and I worked
9 carefully on an affidavit for a number of days trying to figure
11:52 10 it out. I asked Mr. Stepanian, who's still in the business and
11 still in the music industry, what he believed these defendants
12 would generate, and he's certainly qualified to do that because
13 he represented them for four years. And he told me, from the
14 date of the orders, your Honor's orders, through April 13th, I
15 believe that they have grossed \$100,000 in performance fees,
16 obviously plus or minus. And that's based on the Court's
17 definition.

18 From April 13th to the end of May, because there's
19 going to be a lot of activity, as Mr. Pieksen points out, in a
11:52 20 couple of days, excuse me, we believe through the end of May,
21 these defendants are going to gross another \$100,000. What I'm
22 having a problem with, and I think that the defendants --
23 although they made a "good-faith attempt" to comply with the
24 Court's order, what I'm having difficulty with is the Court
25 order said put the performance fees in escrow, not 20 percent

1 of the net fees after you take expenses. And at the rate that
2 we're going, unless Mr. Penton can come up with some other
3 idea, the monies will be secured in some way, shape or form in
4 the year 2025. Thank you, your Honor.

5 THE COURT: Before you sit down, Mr. Baker, and
6 notwithstanding the fact that the injunction says what you say
7 it says, that is, to put all of the funds received into escrow,
8 what was the intent -- what was the understanding of the
9 parties back in January as to how the defendants were going to
11:53 10 live in the meantime? If they were going to put 100 percent of
11 their receipts into escrow, how were they going to survive?

12 MR. BAKER: It's a valid question, absolutely. I
13 don't know the answer to that because Mr. Penton and I had a
14 couple of phone conversations, and I said, This is what I'm
15 looking for. Keep in mind, your Honor, for three-and-a-half
16 years we paid all their living expenses and everything. The
17 monies from the performance came in, and we didn't get to
18 collect any of that. I think if you look over the aggregate
19 period it's not unreasonable for us to say that.

11:54 20 Now, to answer your Honor's question, I don't know the
21 answer to that in all fairness to the Court and certainly to
22 the defendants. But that's not what the court order says. At
23 the rate we're going, it's just never going to amount to
24 anything significant.

25 THE COURT: What about the provision that 30 percent

1 of the fees received in connection with publishing rights --

2 MR. BAKER: That was specifically requested by Mr.
3 Penton, not the 30 percent. If your Honor goes back and looks
4 at the January 19, 2010, letter, which your Honor ordered that
5 I file with the Court -- I submitted it with the injunction
6 proposed order that I gave to your Honor -- Mr. Penton said, I
7 don't want you to take all of the publishing rights, if that's
8 what it says, the 30 percent. I said fine and I submitted the
9 letter to your Honor. And I put in the proposed order which
11:55 10 your Honor then considered and signed. Thirty percent will go
11 to the defendants because I was --

12 THE COURT: And that will amount to what?

13 MR. BAKER: I don't know, your Honor. It was my
14 understanding that that would be a significant amount. I can't
15 tell you what the dollar amount is because none of these
16 reach-and-apply defendants seem to want to account.

17 THE COURT: How does it compare with the projected
18 receipts that your client believes he's going to receive?
19 (Discussion held off the record.)

11:55 20 MR. BAKER: I am informed by my co-counsel that it
21 varies based on the record sales and things of that nature, and
22 I don't know the answer to that. In my conversations with
23 Penton at the time I was -- I believed that that would be a
24 sufficient amount, 30 percent of the publishing rights,
25 certainly for Mr. Porter who's got, as Mr. Penton's papers

1 indicate, 40 years of history in the music business and a
2 substantial worldwide reputation in that regard.

3 THE COURT: All right. Thank you. Mr. Penton.

4 MR. PENTON: Yes, your Honor, may it please the Court.
5 Ronnie Penton. Let me say that I know this Court doesn't know
6 me. I have practiced law in these federal courts in the United
7 States for 30 years. I was a professional musician for 20
8 years. So I bring to my analysis of the Court's order the
9 industry experience as well as the legal experience.

11:56 10 And I'm here personally to tell you that in my 30
11 years I've never been held in contempt by a court in any state.
12 I've never had a client held in contempt. And if the Court in
13 its good reasoning feels that this was contemptuous, I would
14 ask that I be allowed to fall on the sword here and take that
15 responsibility because it was my experience that looked at this
16 order.

17 And I need to explain to the Court why we did the
18 accounting we did. From the time on December 30th that the
19 temporary restraining order was first filed by Highsteppin',
11:57 20 the term "fees" were used. And it was perpetuated through an
21 amended temporary restraining order. It was perpetuated in a
22 request for a preliminary injunction, and it was perpetuated in
23 the order for preliminary injunction where the TRO was
24 converted.

25 Judge, I wrote a letter because we were just retained.

1 We couldn't get here. And the Court was very gracious in
2 allowing us -- in fact, Jeffrey even submitted my letter, which
3 I did appreciate he did that.

4 Judge, the problem we have here, the Court sees it.
5 The fact is, is that these artists have really two types of
6 income that they receive. These particular artists may produce
7 a venue themselves where they put together three or four or
8 four or five side men or musicians to come with them to play a
9 show. As a part of that show, they have travel expenses. They
11:58 10 may have equipment rental expenses. They even may have booking
11 agency expenses that they have to pay.

12 So at the end of that show -- let's just say that
13 they're given an offer of \$2,500 for a two-hour show. Well,
14 they have to pay all these folks. There is no way that -- if
15 you define "fees" as has been perpetuated in these orders,
16 there is no way they could turn over \$2,500 in a self-produced
17 show because they have all these expenses to pay.

18 Now, the other type of income they receive, if they
19 are a side man -- if the Court would take a look at the
11:58 20 spreadsheets, you'll see that in many instances they are side
21 men. In other words, they're paid for the show. They're paid
22 by someone else a flat fee, \$100, \$250, and maybe even
23 sometimes more.

24 The fact is, Judge, if these musicians were required
25 to pay and define fees as 100 percent of gross receipts, they

1 wouldn't work. They couldn't work because they couldn't go do
2 that show and pay 100 percent of that.

3 Now, Judge, when we were trying to determine the
4 identification of fees, we went to great pains. And the Court
5 would see in the spreadsheets, we disclosed it all; in other
6 words, all the expenses, all of the percentages due to someone
7 else, in a spreadsheet form, for this kind of forum here that
8 we're in, that we can work these things out. We were not
9 intentionally trying to be contemptuous. We have all the
11:59 10 information on every one of those shows there.

11 We're prepared to sit down, even in an amended
12 preliminary injunction order, in order to hammer out what
13 "fees" mean. Does it mean gross receipts? Does it mean net
14 receipts? What does it mean? And get together a reporting
15 period as well as a disclosure of all expenses or all
16 percentages or whatever.

17 We looked at the 30 percent of the publishing. I made
18 a comment in the January 19th letter, at least on the
19 publishing that preexisted the relationship with Highsteppin',
12:00 20 you know, please don't take everything they have. Now, Judge,
21 what's interesting, none of these publishers will pay a penny.
22 Every one of the defendants' publishers have said, No, guys.
23 Our policy is we're withholding all publishing royalty until
24 such --

25 THE COURT: Withholding all? I didn't hear it.

1 You're withholding all?

2 MR. PENTON: Yes, sir. The publishing companies are
3 withholding 100 percent of all publishing royalty until these
4 issues -- legal issues are resolved. Now, there were
5 publishing companies that were served with these injunctions,
6 and so it matters not that there's 30 percent that was written
7 into here. They're receiving zero percent of publishing
8 royalties.

9 But, Judge, I would just say that this is our first
12:01 10 time before you. If you feel that my analysis of fees and
11 really looking at the total reality of it -- what we did when
12 we looked at the 30 percent, we tried to capture the 20 percent
13 that was due to Highsteppin'. We tried to itemize all the
14 gross expenses in a show so that if the Court required us to
15 make a higher deposit, we're prepared to do that, Judge.

16 I just would say one thing about it. What we learned
17 in the ten-day rule that was written into it, it was hard to
18 get the first things together because we were in a
19 reconstruction mode. Your order said "not yet payable" if
12:01 20 you'll remember reading that. We went back -- that would have
21 been January 26th. We went back to the show here in Boston at
22 the House Of Blues that they played for the -- the Meters
23 played for the National Hockey League.

24 And we picked that up, too, in a good-faith effort to
25 bring that money forward because Mr. Baker had tried to serve

1 subpoenas, I believe, on certain parties in order to sequester
2 that money where the Meters played. That was just Mr. Porter
3 and Mr. Batiste. Mr. Stoltz didn't play that Meters job here
4 in Boston for New Year's Eve.

5 But, Judge, we made the decision to go back to when
6 the original suit was filed and recapture those dollars, and we
7 did that in order to be in good faith with this Court. So
8 that's my plea to your Honor. I would ask that -- even to
9 counsel I asked, Give me a break. I did the best I could to
12:02 10 make a good-faith showing. We are prepared to modify our
11 reporting in any manner.

12 THE COURT: All right. I think I've heard sufficient,
13 Mr. Penton, and I do appreciate your explanation. It was not
14 the intent of the Court, nor do I believe it was the intent of
15 the plaintiff, to ask for the escrowing of funds before the
16 netting out of expenses that are necessary to gain the gross in
17 the first place. In other words, if your clients, when they
18 make a performance, get a net -- or a gross of -- pick a number
19 out of the air -- 50,000, and it costs them \$30,000 to get that
12:03 20 \$50,000, nobody, at least realistically, can ask them to submit
21 the 50 and not pay their vendors the 30 to make the 50.

22 But having said that, it is certainly, and was, the
23 intent of this Court to require the escrowing of more than what
24 was due just going forward as though the contract had not been
25 breached because I am dealing with an allegation that I found

1 to be, at the stage of the preliminary injunction, a likely
2 winning one. That's the standard under which the plaintiff had
3 to prove to get me to enter a preliminary injunction, a
4 likelihood of success on the merits of their claim. They claim
5 that your clients owe them roughly \$500,000. So they are
6 entitled to have escrowed more than just what would have been
7 going forward with the contract in the first place, which is,
8 as I understand it, the 20 percent.

9 MR. PENTON: Yes, sir.

12:04 10 THE COURT: So somewhere between 20 and 100 percent is
11 an appropriate amount to have been escrowed from the gross
12 receipts of your client, more than 20 if -- albeit, less than
13 100. That's a number that I have no knowledge of being able to
14 determine, but you folks very well should. And I'm going to
15 require you to sit here, because I don't have anything more in
16 this courtroom at least until in the middle of the afternoon,
17 and negotiate this out as to something that is going to be
18 satisfactory to both sides going forward, understanding that
19 what we're trying to do here is to provide the plaintiffs with
12:05 20 some security if and when they are able to prove their case in
21 court.

22 They haven't proved it yet. They've only argued for a
23 preliminary injunction. I was convinced that they were
24 entitled to a preliminary injunction, and I remain convinced
25 that they are. But it's up to you folks to determine exactly

1 what that means and the accounting that is necessary that can
2 put Mr. Baker and his folks on his side in some sort of comfort
3 zone as to knowing that they have got a fund available from
4 which to argue at the end of the day. That's what we're going
5 to do here.

6 Any problem with that, Mr. Baker?

7 MR. BAKER: None whatsoever, your Honor. That sounds
8 reasonable.

9 THE COURT: All right. Why don't you then remain --
12:06 10 you can sit here. We do have a little anteroom out there if
11 you'd prefer to be outside of the courtroom. But you can use
12 this courtroom if you'd like to try to turn the tables around,
13 face each other and see if you can't resolve this issue as
14 we're going to go forward because now we are going to go
15 forward in this case.

16 The next thing is we're going to have a scheduling
17 conference here sooner rather than later because this case has
18 now got some teeth on it. It's what?, three or four months
19 old. We should get to the point of having a scheduling order,
12:06 20 and that -- my deputy will submit to you, if not today, a form
21 that will inform you how to respond. And, basically, it's
22 getting together and deciding what you think is a fair
23 scheduling order, and then I'll determine whether I think it's
24 fair.

25 If necessary, we'll have another conference. I don't

1 mean to drag people back from Louisiana for such a thing. I've
2 certainly in other cases allowed counsel to appear by telephone
3 for scheduling conferences, so that can be done. This is
4 something that counsel ought to sit here today and resolve how
5 we're going to get from A to B.

6 And I am disinclined at this stage to enter an order
7 of contempt. I don't think that you acted deliberately
8 contemptuously, Mr. Penton. I believe that you have been
9 acting in good faith, and I expect that as an officer of this
12:07 10 court, as you are, as is plaintiff's counsel, you will proceed
11 to resolve this issue.

12 Anything else then that needs to come to my attention
13 at this stage?

14 MR. BAKER: Not from the plaintiff's side, your Honor.

15 THE COURT: Mr. Penton?

16 MR. PENTON: None, your Honor.

17 THE COURT: And Mr. Pieksen?

18 MR. PIEKSEN: No, sir.

19 THE COURT: All right. Thank you, counsel. Good
12:08 20 luck.

21 (Whereupon, at 12:08 p.m. the hearing concluded.)
22
23
24
25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter to
the best of my skill and ability.

/s/Cheryl Dahlstrom

04/30/3010

Cheryl Dahlstrom, RMR, CRR

Dated

Official Court Reporter